UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

WILKES-BARRE BEHAVIORAL HOSPITAL CO., LLC d/b/a FIRST HOSPITAL WYOMING VALLEY	:	Case No. 04-CA-215690
and	:	
SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE PENNSYLVANIA	:	

RESPONDENT'S REPLY BRIEF TO CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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For all of the following reasons, the National Labor Relations Board (hereafter, the "Board") should reject the arguments set forth by the Answering Brief filed by the Charging Party, SEIU Healthcare Pennsylvania (hereafter, the "Union") in response to the Exceptions and Brief in Support of the Exceptions filed by the Respondent, Wilkes-Barre Behavioral Hospital Co., LLC d/b/a First Hospital Wyoming Valley (hereafter, the "Hospital") in response to the November 5, 2019 Decision of Administrative Law Judge Geoffrey Carter (hereafter, the "Decision").[1]

ARGUMENT

1.) The Union Misconstrues the Factual Record

In its Answering Brief, the Union repeatedly misconstrues and mis-states the evidentiary record in the instant case, in an attempt to support its claim that the Union did not act in bad faith during the underlying negotiations which led to the Hospital's declaration of impasse. First, the Union attempts to minimize the extent of its bad faith actions, by claiming that the Hospital's argument is based solely upon the Union's "allegedly" late arrival to "several" bargaining sessions. AB 2. However, as the Hospital's Exceptions made clear, the Hospital's claim of bad faith on the part of the Union is based only in part upon the Union's late arrival to bargaining, and

[1] For purposes of this Reply Brief, the Hospital shall employ the same shorthand references used by the Hospital's Brief in Support of Exceptions. Citations to the Hospital's Brief in Support of Exceptions shall be notated "BSE", and citations to the Union's Answering Brief shall be notated "AB."

additionally cites to: the Union's unilateral and last-minute cancellation of the July 25, 2017 bargaining session between the parties [2]; the Union's two-week delay in informing the Hospital of the results of the ratification vote by the Union's membership; the Union's dissemination of a factually inaccurate and inflammatory flyer to employees; and the Union's disingenuous "stall tactics" in an effort to avoid the parties reaching a legitimate impasse, from claiming they did not know what contract they were scheduled to bargain and claiming that the weather prevented them from bargaining for hours. See BSE 26-30, 43-48. Thus, the Union's additional claims that the Hospital did not allege, and / or did not prove, any bad faith conduct "away from the table" or intent on the part of the Union to avoid agreement, are also equally disproven by the evidence. AB 3; See BSE 44 ("[T]he Union engaged in bad faith conduct away from the table, by repeatedly misrepresenting the status of negotiations in flyers it sent to the employees of the SMT Unit."); ("The Union's numerous attempts to create and further delay in the parties' bargaining process were designed to prevent the parties from ever reaching an agreement or a genuine impasse.").

Furthermore, with regard to the Union's near-constant late arrival to negotiating sessions, the Union strives unsuccessfully to downplay the evidentiary

[2] In this regard, the Answering Brief's contention that the Union had not cancelled any bargaining sessions (AB 6) is demonstrably false.

record. The Union varyingly claims it was never late, or late to only "several" bargaining sessions. AB 2, 3, 4. The evidentiary record illustrates that the Union was, in fact, unable to begin bargaining at the scheduled time on at least fourteen of seventeen occasions - an occurrence so regular that, contrary to the Union's assertion, it very much constitutes "a pattern of delay" (AB 6). See BSE 26. The Union's ongoing attempt to characterize these late arrivals as "caucuses" that took place at the outset of bargaining sessions (AB 3) is unavailing.[3] First, the record illustrates that, with regard to a number of specific dates, the Union's claims are patently false, and that members of the Union's bargaining team, including Hefty, were not even present in their caucus room when bargaining was scheduled to begin.[4] See (Tr. 265, 296, 308, 341, 346, 398); R. Exs. 34, 45. Second, the record proves the wholesale falsity of the Union's claim, unsupported by any citation to the record, that both the Union and the Hospital began bargaining sessions by caucusing privately. AB 4. To the contrary, Sincich's uncontroverted testimony was that the

[3] In fact, the Union's own Answering Brief contradicts itself on this point, first claiming repeatedly that the evidence supported its contention that the Union was not late, but later admitting that "at times", the Union's committee would arrive late. AB 3, 4, 5.

[4] Equally disproven by the evidence is the Union's claim that, at the outset of each bargaining session, Hefty would timely "check in" with the mediator. AB 3. Sincich testified, and his bargaining notes indicate, that on multiple occasions he went to the Union's caucus room, and was informed that Hefty had not yet arrived. (Tr. 265, 308, 341).

Hospital was *never* the cause of a delayed start time during negotiations. See (Tr. 305)

Finally, the Union inaccurately claims that the Hospital did not make any "serious" objection to the Union's bad faith actions at the time they occurred. AB 4. The record proves that this assertion is simply untrue. Sincich objected on multiple occasions to the Union's numerous late arrivals to bargaining, and began tracking this repeated occurrence. See R. Exs. 15, 46 (p.4). Sincich objected by email to Hefty regarding the Union's unilateral cancellation of the July 25, 2017 bargaining session. See (Tr. 128, 326-29, 435); R. Exs. 41, 42. Sincich emailed Hefty to follow up about the result of the ratification vote. See (Tr. 130-31, 338); G.C. Ex. 9; R. Ex. 2. Sincich objected to the Union's dissemination of the factually inaccurate and inflammatory flyers, at bargaining and in writing. See (Tr. 297); R. Ex. 29, 46. The record is thus demonstrably filled with the Hospital's real-time objections to the Union's conduct.

2.) The Union's Flawed Analysis of the Law

In part due to the Union's many, unconvincing efforts to downplay the record evidence of its bad faith conduct, the Union's Answering Brief is also flawed in its analysis of the law. First, the Union claims that its "isolated conduct" does not amount to a failure to bargain in good faith. However, the actions of the Union, as set forth by the evidentiary record, have previously been considered by the Board

sufficient indicia of a party's bad faith. See Serramonte Oldsmobile, 318 NLRB 80 (1995); Paperworkers Locals 1009, 311 NLRB 41 (1993). The Union's citations to cases such as Merrell M. Williams, 279 NLRB 82 (1986) to support its contentions are wholly unavailing. Merrell stands only for the proposition that withdrawing a tentative agreement, standing alone, does not necessarily constitute bad faith bargaining. The Union is not accused of withdrawing a tentative agreement, but instead with myriad other indicia of bad faith – from delaying and attempting to delay bargaining, unilaterally cancelling and postponing bargaining sessions, engaging in regressive bargaining, and publishing false and misleading information about negotiations away from the bargaining table. Such bad faith actions are not addressed by the cases cited by the Union in its defense. Similarly, the most useful takeaway from and Roman Iron Works, 275 NLRB 449 (1985), cited by the Union, is its citation to Abingdon Nursing Center, 197 NLRB 781, 787 (1972) for the proposition that a determination of "good faith, or want of it, is concerned essentially with a state of mind", and evidence thereof "must be considered in unity." Roman Iron Works, 275 NLRB at 452. In the case at bar, such consideration warrants the conclusion that the Union acted in bad faith, with the intent to prevent the parties from progressing to a point of impasse in the instant negotiations.

Indeed, many of the cases cited by the Union better serve to support the Hospital's claim than refute it. For example, Calex Corp., 322 NLRB 977 (1997)

and Pavilion at Forrestal Nursing and Rehab., 346 NLRB 458 (2008) do not – as claimed by the Union - stand for the proposition that a certain, specific number of bargaining sessions must be cancelled in order to establish bad faith. Rather, Calex states that a party's actions must evince a "pattern of delay" to establish bad faith. Calex, 322 NLRB at 977. Similarly, Pavilion explains that the test is whether a party engaged in "an egregious course of dilatory tactics." Pavilion, 346 NLRB at 461-462. In the case at bar, though the Union cancelled only one bargaining session, it delayed numerous others and deployed weak excuses in an effort to prevent bargaining on many others. Viewed together, "in unity", the Union's actions evince a pattern of delay and an "egregious course of dilatory tactics", and thus constitute bad faith bargaining.

Next, the Union's claim that it did not engage in bad faith away from the bargaining table is equally unsupported by the evidentiary record, as described above, and the law. The Board has held that a party's bad faith conduct away from bargaining table is particularly relevant to an allegation of bad faith bargaining, where the party's conduct was intended to undermine bargaining between the parties and delegitimize one's bargaining counterpart. Thrill, Inc., 298 NLRB 669, 672 (1990). Such an intent was the primary purpose for the Union's publication of its misleading flyer to Hospital employees, which took credit for a "bargaining victory" which, in reality, the Union had fought against. Here too, the Union's citations do

little to further its arguments. For example, in both Summa Health System, Inc., 330 NLRB 1379 (2000) and Regency Service Carts, Inc., 345 NLRB 671 (2005), the Board again reiterated that the question of bad faith must be based on the "totality" of the evidence and conduct, "*both* at and away from the bargaining table" (emphasis added), rather than any one factor, or solely on the basis of bad faith tactics away from the bargaining table. Thus, in the case at bar, it is clear that the totality of the Union's conduct, both at and away from the negotiating table, must be analyzed, and as a result of that analysis, the Union should be found to have acted in bad faith.

Furthermore, there is no precedent to support the Union's contention that delaying the start of negotiations between the parties for hours on end in order to caucus (as distinguished from a caucus in the midst of a session)[5] is not itself legally acceptable evidence of bad faith. In fact, there is precedent which suggests that such pretextual explanations for delay may, itself, prove the Union's bad faith. See Paperworkers Locals 1009, 311 NLRB 41 (1993) (Advancing information request was pretext for creating delay); Serramonte Oldsmobile, 318 NLRB 80 (1995) (Arguments advanced by union during negotiations were a pretext used to delay bargaining process.) Similarly, the Union's claim that hours-long caucuses at the

[5] This important and rather straightforward distinction is ignored by the Union's Answering Brief so that the Union might advance its untenable "slippery slope" argument predicting a wave of new bad faith bargaining allegations if the Union's distinguishable behavior is held to constitute bad faith. See AB 4.

outset of bargaining sessions constituted "the normal course of bargaining" is equally unsupported by any precedent cited by the Union.

Finally, the Union's claim that the Hospital did not raise "serious" objections about the Union's bad faith conduct at the time it occurred is not only provably false, but also legally irrelevant. AB 4. The Hospital was under no obligation to raise an objection in real time in order to preserve an argument that the conduct constituted bad faith. Indeed, as the Union's own Answering Brief admits (AB 2, 3), the "totality of the evidence" standard for bad faith requires an analysis of the totality of a party's conduct, under which, therefore, piecemeal objection to each individual bad faith act could not possibly be required, as a party could not and would not evaluate bad faith on the basis of each, individual bad faith act, but rather cumulatively. Indeed, the cases cited by the Union in connection with this argument do not speak to a party's "obligation" to object in real time to bad faith conduct, but instead address the wholly irrelevant question of whether a party's refusal to engage in longer or additional bargaining sessions would constitute bad faith. See AB 4. Accordingly, in keeping with an emerging theme, the Union's Answering Brief is once again wrong on the facts, and wrong on the law.

3.) The Union's Bad Faith Actions Are Not "Irrelevant"

The Union's apparent argument in the alternative, that the Hospital's defense premised upon the Union's bad faith actions is "irrelevant" (AB 5), directly

contradicts current Board precedent. See Serramonte and Paperworkers, *supra*. Though the Union's recognition that "multiple, serious unresolved issues" (AB 5) remained outstanding between the parties is, for once, accurate, this fact does not exclude the role that the Union's bad faith played in the parties reaching an impasse in negotiations. The Union's delays and attempts to avoid bargaining instilled in the Hospital the good faith belief that the Union would never reach a deal, or admit that it was at the end of its bargaining rope – instead, it would continue to stall, in an attempt to forever avoid the inevitable declaration of impasse between the parties. Thus, the Hospital has every right to raise the Union's conduct during negotiations, and that conduct demonstrates unequivocally the Hospital's right to declare impasse.

4.) The Hospital is Entitled to Raise the Union's Bad Faith as a Defense

Finally, equally unconvincing is the Union's attempt to rely upon the dismissal of a bad faith bargaining Charge filed by the Hospital against the Union in an effort to avoid having to defend its bad faith actions. The Union claims that the Hospital's Exceptions must be dismissed by the Board, because the Hospital's earlier Charge was dismissed by Region Four of the Board. AB 5. The Union's position either ignores or badly mis-states the law. As cited *supra*, the Board has long held that the bad faith of a party is part of the totality of the circumstances analyzed when considering a declaration of impasse. Furthermore, as cited herein, the Board has additionally held that bad faith bargaining by a union may justify an employer's

implementation of its final offer. Contrary to the Union's confused assertion, raising the Union's bad faith actions in support of the Hospital's position that the parties could make no further progress in negotiations does not constitute a "second appeal" or "collateral attack" of the Region's dismissal of its Charge. AB 5, 6. Rather, the Board's precedent establishes that the Hospital was not precluded, and is in fact entitled, to raise the Union's bad faith conduct in support of its declaration of impasse and implementation of its final offer; and the evidentiary record establishes that the Hospital's arguments in this regard are convincing.

CONCLUSION

For all the reasons set forth above, the Hospital respectfully requests that the Board reject the arguments set forth by the Union's Answering Brief, sustain the entirety of the Hospital's Exceptions, and dismiss the entirety of the underlying Complaint.

Dated: April 2, 2020
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Respectfully submitted,

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CERTIFICATE OF SERVICE

As an attorney duly admitted to the practice of law, I do hereby certify that, on April 2, 2020, I served a copy of the document above on the following *via* e-mail:

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Respectfully submitted,

/s/_____

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